LIBRARY
SUPREME COURT, U. S.

FILED
NOV 25 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 19 No. 801

NEIL A. WOODINGTON,

Appellant,

vs.

STATE OF WISCONSIN,

Respondent.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

JURISDICTIONAL STATEMENT

IMMELL, HERRO, BUEHNER,
DeWITT & SUNDBY, S.C.
110 East Main Street
Madison, Wisconsin 53703

Attorneys for Appellant

INDEX

Page

Opinion Below..... 1

Jurisdiction..... 2

Statute Involved..... 3

Questions Presented..... 3

Statement of Case.....4

The Questions Are Substantial.....16

Conclusion..... 54

CITATIONS

Alcorta v. Texas, 355 U.S. 28 (1957).....44

Baggett v. Bullitt, 377 U.S. 360 (1964)... 25

Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 (1931)..... 19

Beck v. Ohio, 379 U.S. 89 (1964).....44

Brady v. Maryland, 373 U.S. 83 (1963)..39, 44

Bridges v. California, 314 U.S. 252 (1941).....37

Byrd v. U.S. 342 F (2d) 942 (1965).....54

Chambers v. Florida, 309 U.S. 227, 236-237 (1940)..... 37

Page

Cline v. Frink Dairy Co.,
274 U.S. 445, (1927).....18, 19

Coplon v. U.S., 89 U.S. App. D.C.
103, 191 F (2d) (cert. den. 342
U.S. 926) (1951)..... 42

Estes v. Texas, 381 U.S.
532 (1965)..... 38, 42, 48, 49

Gelling v. Texas,
343 U.S. 960 (1952).....2, 19, 22

Griffin v. California,
380 U.S. 609 (1965).....44

Herndon v. Lowry, 301 U.S. 242 (1937)... 2

Irvin v. Dowd,
366 U.S. 717, 728 (1961)..... 44, 49

Lambert v. California
355 U.S. 960 (1952)..... 2

Lanzetta v. New Jersey,
306 U.S. 451 (1939).....2, 19, 21, 22

Mapp v. Ohio, 367 U.S. 643 (1961)..... 44

Mooney v. Holohan, 294 U.S. 103 (1935)...44

In re Murchison,
349 U.S. 133, 136 (1955)..... 49

Page

Napue v. Illinois, 360 U.S. 264 (1959).....44

Pennekamp v. Florida,
328 U.S. 331, 359 (1946)..... 50

Robinson v. California,
370 U.S. 660 (1962)..... 2

Rogers v. Richmond, 365 U.S. 534 (1961)... 40

Sheppard v. Maxwell,
384 U.S. 333 (1966).....30, 43, 44, 47, 51

State v. Cory, 62 Wash. (2d) 371,
382 P. (2d) 1019 (1963).....41

State v. Eisbach, 263 Wis. 554,
47 NW (2d) 725 (1953).. 24

State v. Evjue, 254 Wis. 581,
37 N.W. (2d) 50 (1949)..... 54

Thornhill v. Alabama, 310 U.S. 88 (1940)...22

U.S. v. L. Cohen Grocery Co.,
255 U.S., 81 (1921).....18

U.S. v. Petrillo, 332 U.S. 1 (1947)..... 26

U.S. v. Taylor, 11 F. 470 (1882).....54

Winters v. New York, 333 U.S.
507 (1943)..... 2, 22

Page

Yakus, v. U.S., 321 U.S. 414 (1944).... 28

Statutes:

Wisconsin Statutes,
Section 189.19(2)(d)..... 3, 16

Article I, Section 7, Wis. Const..... 54

Mutual Industrial Bankers, Inc.,
1 SEC 268, (1936)..... 53

Red Bank Oil Co., 25 SEC 334 (1947)..... 53

Securities Regulations,
Second Edition (1961), Vol. 1..... 23

Void for Vagueness Doctrine,
109 U. of Penn. L. Rev. 67 (1960)..... 19

28 U.S. Code section 1257 (3)..... 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 19 No.

NEIL A. WOODINGTON,

Appellant,

vs.

STATE OF WISCONSIN,

Respondent

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

JURISDICTIONAL STATEMENT

OPINION BELOW

The judgment and orders of the Circuit Court of Dane County, Wisconsin are not reported. The opinion of the Supreme Court of Wisconsin affirming the judgment of the Circuit Court is reported in 31 Wis. 2d 151 (1965); the per curiam decision of the Supreme Court denying appellant's motion for rehearing is reported in 31 Wis. 2d 151 at page 182 (a). The judgment

of the Circuit Court and the opinion and decision of the Supreme Court of Wisconsin are set forth in the Appendix, infra.

JURISDICTION

Prosecution was instituted against appellant under section 189.19(2)(d) of the Wisconsin Statutes for filing a false and misleading statement with the Department of Securities. It was alleged that the negligence and mens rea clauses of said statute are void for vagueness under the due process clause of the 14th Amendment to the Constitution of the United States. On June 7, 1966, the Supreme Court of the State of Wisconsin decided in favor of the validity of the statute and affirmed the judgment and orders of the Circuit Court for Dane County, Wisconsin, adjudicating appellant guilty under the statute and sentencing him to an indeterminate term of not to exceed three years in the State prison at Waupun, Wisconsin. Appellant's motion for rehearing was denied by a per curiam decision on July 27, 1966. Notice of appeal was filed by appellant on August 5, 1966. Jurisdiction to review a judgment of the highest court of a state by appeal is conferred on this Court by 28 U.S. Code, section 1257(2). That such jurisdiction exists in the circumstances of this case is sustained by the following decisions: Lanzetta v. New Jersey, 306 U.S. 451 (1939); Winters v. New York, 333 U.S. 507 (1948); Gelling v. Texas, 343 U.S. 960 (1952); Lambert v. California, 355 U.S. 225 (1957); Robinson v. California, 370 U.S. 660 (1962); Herndon v. Lowry, 301 U.S. 242 (1937). As to questions other than

the validity of a state statute, jurisdiction to review, by certiorari, the judgment of the highest court of a state is conferred on this court by 28 U.S. Code, section 1257 (3).

STATUTE INVOLVED

Wisconsin Statutes, section 189.19(2) (d):

"189.19 Criminal liability.

.....

"(2) Every director, officer, agent or employe of any issuer and every dealer, agent, investment adviser or other person shall be imprisoned in the state prison not exceeding 5 years, or in a county jail not exceeding one year, or fined not exceeding $5,000, or both, who shall directly or indirectly:

.....

"(d) File or cause to be filed with the department any statement or representation of a material fact, which statement or representation he knows or in the exercise of reasonable care should know to be false or misleading;"

QUESTIONS PRESENTED

1. Whether portions of the state statute under which appellant is charged and which the State Supreme Court declared to be valid

and not repugnant to the Constitution of the United States, are void for vagueness under the due process clause of the 14th Amendment?

2. Whether the pre-trial publicity in this case was so prejudiced and unfair that there is a reasonable likelihood that the appellant did not receive a fair and impartial jury trial?

3. Whether the politically-motivated conduct of agents of the state during the investigative phase of the proceeding amounted to a violation of due process under the 14th Amendment?

4. Whether the main source and generator of pre-trial publicity--the attorney general of the state and his agents--so prejudiced the case of the appellant that the appellant is entitled to a dismissal of the information?

5. Whether the trial court's instructions on a material element of the crime charged constituted a directed verdict as to that element of the crime, thus denying to appellant a trial by jury?

STATEMENT OF CASE

In August, 1964, Neil A. Woodington was a thirty-seven year old Madison, Wisconsin businessman. He was vice-president and a director of Madison American Guaranty Insurance Corporation (hereafter called MAGIC) and president and a director of Allied Development

Corporation (hereafter called Allied), a corporation engaged in several businesses, primarily real estate development, construction, property management and sales, and retailing of building materials and fuel oil. Robert C. Kelly was a business associate of Woodington and was president and a director of MAGIC and vice-president, secretary and a director of Allied. MAGIC was a publicly held corporation, but Allied was closely held with fifty percent of its stock owned by corporations controlled by Woodington and fifty per cent held by Hoard's Creameries, Inc. (hereafter called Hoard's). Kelly was chief executive officer of Hoard's, a well-capitalized distributor of milk products. One company holding a substantial amount of stock in Allied was Brooks & Woodington, Inc. (hereafter called B&W) of which Woodington and Kelly were respectively president and treasurer. Both were directors. Clarence Bylsma was general counsel for MAGIC, Allied and B&W. He was also secretary and a director of MAGIC.

The operations of B&W started in 1953. Both Allied and MAGIC were involved in public stock issues, the second for MAGIC and the first for Allied. Allied's stock offering involved two million dollars while MAGIC's involved one million seven hundred thousand dollars.

Late in August of 1964 the Wisconsin Department of Securities suspended public sale of stock by MAGIC primarily because of interlocking management and mortgage loans to Allied customers by MAGIC which might violate

Wisconsin's conflict of interest laws. An agreement was reached with the Department of Securities whereby Woodington and Bylsma resigned as officers and directors of MAGIC and Bylsma became a director of Allied. Kelly remained as president of MAGIC and as an officer and director of Allied. Just prior to this agreement, the Republican Attorney General, Thompson (hereafter called A.G.), in a letter to Democratic Governor Reynolds, charged that a Democratic appointee, the Commissioner of Insurance, was refusing to cooperate with Thompson in investigating MAGIC and Allied. The Insurance Department was conducting its own examination of MAGIC at the time at the request of MAGIC, preliminary to expansion into other states. Considerable publicity was given to Thompson's letter demanding removal of the Commissioner. The details of this and other public charges by the A.G. that the Insurance Commissioner was covering up for wrongdoing by Woodington, Kelly and Bylsma are set forth at length in Exhibit 11 admitted at the hearing on motions to dismiss prior to trial. From September 2nd until November 6th, the day Woodington was formally charged, the A.G., through press conferences, press releases, and letters to the Governor and newspaper editors, continued his attack upon Woodington and his business associates. The A.G. was then running for reelection against a familiar Wisconsin political name, LaFollette. Other Republican candidates soon took up the A.G.'s charges of corruption in government and protection of "cronies" of the Governor and

the Insurance Commissioner. The Madison newspapers gave these charges front-page treatment throughout the campaign. Since the campaigns were state-wide in nature, the press throughout the state gave the charges broad coverage. Woodington and Bylsma had been active in Democratic politics and their campaign contributions and those of Woodington's attorney were centered upon by the Republican politicians, intimating pay-offs for protection from prosecution if LaFollette were elected.

On September 16th, the change of management described above took place and the Securities Department permitted the resumption of sale of MAGIC stock, noting that no conflict of interest situation had yet arisen but that "the possibility of one" had now been removed. On September 18th the Securities Department suspended the sale of both Allied and MAGIC stock on the grounds that the continuing investigation of the A.G. showed signs of "check kiting" in Allied and that, since Hoard's checks were used, Kelly, as chief executive officer of Hoard's, was involved.

These check kiting charges received banner headlines. Demands were immediately served upon the newspapers and the Director of the Department of Securities for retraction of the charges. On October 3rd, the Director of the Department of Securities sent a letter to the then attorney for Woodington and Kelly stating, "at no time has there been any statement made by this office, either in official publications or in interviews, charging that

either Mr. Kelly or Hoard's Creameries have been engaged in check kiting practices."

On September 30th, in a dramatic press conference, the A.G. signed complaints charging Woodington, Kelly and Bylsma with filing false statements with the Securities Department. The complaints referred to both MAGIC and Allied. The A.G. further announced to the press and television and radio people present that he was turning the complaints over to the Democratic District Attorney (hereafter called D.A.). From that time on, the A.G. and the press made frequent demands that the D.A. take action on the complaints of September 30th. Correspondence which reached the front page of the newspapers was carried on by the A.G. and the D.A., with the A.G. charging that the D.A. was stalling, and the D.A. charging that the A.G. was playing politics. Attacks also continued on the Insurance Commissioner and the Governor for allegedly covering up wrongdoing of Woodington and his associates.

In late October the Republican candidate for District Attorney against the D.A. petitioned for a grand jury investigation of the criminal charges. Three circuit judges heard the petition. It was denied on the grounds that there was no evidence that the prosecuting officers had shirked their responsibilities in handling the complaints. At this hearing, the Deputy Attorney General conceded that the A.G. could have prosecuted those charged and that the complaints which had been

delivered to the D.A. were faulty and would not justify the issuance of a warrant.

The other media of mass communication, television and radio were also involved in the charges and counter-charges about Woodington. For his election campaign, the A.G. prepared a video tape shown over television stations thirty-five times on seven stations covering all areas of the state where television could be seen. The presentation was accompanied by the background music played during the radio and television show entitled "Dragnet" and attacked the Governor and the Insurance Commissioner for political favoritism, and attacked at length the activities of the officers of MAGIC, going into some detail as to political contributions supposedly made to LaFollette. The Republican Party of Wisconsin had prepared, to assist the Republican candidate for District Attorney, a radio tape to be played with the background music, "That Old Black Magic." The broadcast suggested that the D.A. would not take action against the officers of MAGIC.

On November 6th, Woodington and Kelly were named in criminal complaints filed by the D.A. The charge on which Woodington and Kelly were ultimately tried was filing a false and misleading financial statement of Allied with the Department of Securities. The statement was alleged to be false or misleading with respect to the cash item of $224,356 as shown on the balance sheet dated March 31, 1964. This certified balance sheet was prepared after audit by an independent firm of

Certified Public Accountants, Virchow, Krause and Company.

A preliminary hearing began December 9, 1964 and continued for two weeks. At that hearing and later at trial, the State produced accountants who indicated their belief that the cash item was inaccurate for the following reasons:

1. A transfer of $100,000 from Continental Illinois National Bank of Chicago to Allied's bank in Madison did not actually occur until April 1, 1964, although the actual borrowing and all the documents in connection with the borrowing were signed on March 31, 1964. Virchow, Krause & Company had treated the deposit as a deposit in transit, knowing that the deposit had not actually reached the bank until the first of April.

2. Certain checks of Woodington and B&W totalling $168,000 were criticized because some were dated April 1 and the accounts on which they were drawn had, the State contended, "minimum book overdrafts."

3. The opening balance used in reconciling was alleged to be inflated by $100,000 because of check exchanges with Hoard's, although it was conceded by the State that Hoard's had "collected" funds in its account to cover the $100,000 and further conceded that the entries on Allied's books reflected these transactions.

The entire preliminary involved voluminous testimony concerning check kiting and the State attempted to show that kiting had been going on for at least a year before March 31, 1964 and continued for approximately six months thereafter. Woodington and Kelly contended that the Hoard's checks were short-term loans and were drawn on collected funds.

In presenting its case at trial, however, the State dropped completely the use of the word "kiting", probably because it had learned during the preliminary of the authorization of credit by the banks in connection with the check exchanges, and check kiting under most definitions involves the use of unauthorized credit. The defense on cross-examination brought up the prior testimony charging kiting to emphasize the banks' authorization of credit and the change of position by the State.

The preliminary examination (which was made a part of the subsequent pre-trial motion to dismiss the informations) and the trial produced no evidence that the Certified Public Accountants who performed the certified audit were misled in any way by Woodington or any other officer of Allied. Testimony revealed that the Certified Public Accountants were aware of every check in the deposits in transit which were subsequently attacked by the State. There was no charge at any time by the State that the financial statements were false or misleading in any other respect. No charge was made that the net worth of the companies as shown on the balance sheet was inaccurate

or that the profit figures were in any way false or misleading.

The testimony revealed that Allied was the largest builder of apartments in the City of Madison and that at a given time it would have under construction about $1,000,000 in single family construction and about another $1,000,000 in apartments. It had a cash flow of about $1,000,000 a month. It had begun operations in 1962 with $250,000 in cash and $500,000 in property and other assets, with a net worth of $750,000. By March 31, 1964, its assets totalled over $5,000,000. Its operations had been profitable from the very beginning and another $250,000 in cash had been put into the firm in 1963, increasing its net worth to over $1,000,000. The cash item as of March 31, 1964 represented only about 4 1/2% of total assets.

The Securities Department never questioned the cash item on the balance sheet or discussed cash with any officer of Allied in spite of the fact that statements filed with the Department revealed wide fluctuations in cash, and that considerable study was made of the balance sheet and the underlying assets by the Department.

All transactions which should have been reflected on the books of Allied were shown on those books. The certified audit was completed in May of 1964 and filed within minutes of the time it was received by Allied. There was no evidence produced at the trial that any

officer or employee ever misled the auditors or tried to dictate what any of the figures should be.

The evidence was undisputed that the American Exchange Bank in Madison permitted Allied to draw on uncollected funds and that the Commercial State Bank and bank examiners treated the Hoard's checks as the equivalent of cash.

Much of the testimony about check kiting during the preliminary received banner headlines in Madison newspapers and Woodington and Kelly were bound over for trial in December, 1964.

In January of 1965, because of the impairment of credit as a result of the cumulative adverse publicity initially generated by the charges of the A. G., Allied filed a petition for an arrangement with creditors under Chapter XI of the Bankruptcy Act. This arrangement proposed payment of 100 cents on the dollar. At the time of the trial, Woodington was the actual day-to-day operating manager of Allied, and various other related companies. His decisions and actions were subject to veto power by court-appointed receivers. Creditors of Allied voted approximately ten to one in favor of the proposed plan.

On April 9, 1965, a hearing was held on the motion of Woodington and Kelly to dismiss the informations on three grounds:

1. That the activities of the State in conducting the investigation and prosecution of these actions constituted such outrageous misconduct as to be unconstitutional due to violation of the due process clause of the 14th Amendment.

2. That the section of the Wisconsin Statutes under which Woodington and Kelly were charged was void for vagueness.

3. That the magistrate conducting the preliminary examinations did not have jurisdiction to conduct such preliminary examinations.

The trial court denied the motions for dismissal, whereupon Woodington and Kelly sought review of this decision by the State Supreme Court through Writ of Prohibition. The Supreme Court refused to issue the Writ on the grounds that Woodington and Kelly could raise the question on appeal after trial. The void for vagueness question and the pre-trial publicity and conduct of the State was raised on appeal along with other questions.

After trial in July of 1965, Woodington and Kelly were found guilty by the jury. Woodington was sentenced to three years in the State prison and Kelly was placed on probation.

The Federal questions sought to be reviewed are:

1. The void for vagueness question.

2. Prejudicial pre-trial publicity and conduct by the Attorney General and other State agents.

3. Denial of due process in denying appellant a trial by jury because the trial court directed a verdict on a material element of the crime charged.

Questions 1 and 2 were raised April 5, 1965 in motions to dismiss before trial. (R.2) The motions were denied in a decision dated April 22, 1965. (R.3-18) An unsuccessful attempt was made to raise these questions by applying for a Writ of Prohibition to the Supreme Court of Wisconsin by petition dated May 7, 1965. These questions were again raised by motions after verdict to the trial court dated August 4, 1965. (R.38-52) They were presented by appeal to the Supreme Court of Wisconsin, argued on April 18, 1966. (R.100, 116) Question 2 was again presented to the latter court on motion for rehearing denied on July 27, 1966. (R.155)

Question 3 was raised by submitting a request for a jury instructions (R.19, 27) by a motion after verdict dated August 4, 1965 (R.41-45), on appeal to the Supreme Court of Wisconsin argued on April 18, 1966, and on motion for rehearing to the latter denied on July 27, 1966.

In the opinion of the Supreme Court of Wisconsin in this case at 31 Wis. (2d) 151, 183, the Court said:

"...The sentence imposed, upon the record before us, seems quite severe but that fact does not go to the merits of the conviction." (R. 119)

On June 27, 1966, at the same time he moved for a rehearing, Woodington petitioned the Supreme Court of Wisconsin for review of his sentence and moved for stay of execution and for probation. In a brief supporting this petition, the difference of sentences between Woodington and Kelly and the record indicating that the difference appeared to be based solely on resignation of employment with Allied was pointed out, but no constitutional question concerning severity of sentence was presented to any Wisconsin court. The Supreme Court denied this motion. (R. 157)

THE QUESTIONS ARE SUBSTANTIAL

I.

Sec. 189.19 (2) (d) Wis. Stats. Is Void for Vagueness Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

A. Introduction

Chapter 189 of the Wisconsin statutes contains the Securities Law. The negligence clause of Section 189.19 (2) (d) provides in part that every director, officer, agent or employee of any issuer....who shall directly or indirectly....file or cause to be filed with

the Department of Securities any statement or representation of a material fact which statement. . . . in the exercise of reasonable care (he) should know to be false or misleading. . . . shall be imprisoned. . . . not exceeding five years. . . . or fined not exceeding $5,000 or both. This clause is void for vagueness because it fails to give fair warning of criminal consequences to an individual seeking to embark upon a morally ambiguous course of action and it carries the potential of labeling as blameworthy-because-criminal, a person who is in fact morally blameless.

Not only the negligence clause set forth above, but also the mens rea clause is void for vagueness. The mens rea clause provides in part that every director, officer, agent or employee of an issuer... who shall directly or indirectly. . . . file or cause to be filed with the department any statement or representation of a material fact, which statement or representation he knows to be. . . . misleading . . . . shall be imprisoned in the state prison not exceeding five years. . . .

The term "misleading" in the context of this statute refers to no one to whom the statement is misleading, and hence is a statutory category which is void for vagueness within the meaning of the Fourteenth Amendment.

Since the void for vagueness doctrine is complex, and involves consideration of variables, the rationale will be stated with

reference to appropriate cases and then the rationale will be applied to the facts of this case. The most general statement of the vagueness rationale is:

> "That it will not do to hold an average man to the peril of an indictment for the unwise excercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result." Cline v. Frink Dairy Co., 274 U.S. 445, (1927).

Thus, the doctrine focuses upon two distinct yet interrelated factors: (1) the individual at a point in time when he is considering a course of conduct which may be in violation of the law; and (2) the process of adjudication after the individual has embarked upon the course of conduct and that course is challenged as criminal.

The doctrine considers vagueness both as to (1) the standard of liability, and (2) the proscribed behavior.

B. The Negligence Clause

The negligence clause of the statute holds appellant to the standard of liability of "reasonable care". Appellant contends that he is in the same position as the decision makers in U.S. v. L. Cohen Grocery Co., 255 U.S., 81 (1921) who had to decide in

advance whether a particular price was "unreasonable". He is in the same position as the executives in Cline v. Frink Dairy Co., 274 U. S. 445 (1927) who had to decide in advance whether particular relationships with other businesses were motivated by a desire for "reasonable profit". He is in the same position as the executives in Bandini Petroleum Co. v. Superior Court, 284 U. S. 8 (1931) who had to determine whether one technique or another would be more likely to result in "unreasonable waste in oil production." Under the rationale of all these cases, the negligence clause of Section 189. 19 (2) (d) is unconstitutional under the Fourteenth Amendment.

The problem of negligence or reasonable care in the context of a statute such as Section 189. 19 (2) (d) is well stated in the Void for Vagueness Doctrine, 109 U. of Penn. L. Rev. 67 (1960) at page 90.

> ". . . The common fault of the too incomprehensible statute in Lanzetta, the too approximate statute in Cline and the too discretion-giving statute in Gelling (Gelling v. Texas, 343 U. S. 960 (1952)) is that each injects into the governmental wheel so much free play that in the practical course of its operation it is likely to function erratically, responsive to whim or discrimination unrelated to any specific determination of need by the responsible policy-making organs of society - and to result in a significant number of impermissible public-versus-private-interest

resolutions which are beyond the effective discovery or appraisal of the Court." (Citation in parenthesis supplied)

The State argued that the statute is "as definite and certain in these terms as the subject matter will permit". We do not believe that this is true. For example, adding the words in his particular capacity after the words reasonable care in Section 189.19 (2) (d) would make the standard of liability more certain. It would indicate that the standard of liability for an office boy employee would not be the same as that for a company comptroller with many years of accounting experience although both would be held to a standard of "reasonable care".

Adding the words from the standpoint of investment profitability to a reasonably prudent investor after the words false or misleading in Section 189.19 (2) (d) would help clarify the category of proscribed behavior. This would indicate that the statement would have to be false or misleading from an investment profitability standpoint. This should be the concern of the state: that there be no misrepresentation of the desirability of the investment, i.e. its profitability.

It is also important that the statement be false or misleading to a reasonably prudent investor rather than to any one of thousands of potential investors some of whom may not be able to read, to say nothing of understanding a balance sheet.

The statute could be amended so that it would no longer be too vague to afford a practical guide to permissible conduct by clarifying the standard of liability and the proscribed behavior.

C. The Mens Rea Clause

The mens rea clause of Section 189.19 (2) (d) can be analyzed into two separate provisions. (1) It is a crime for a defendant to intentionally cause to be filed a registration statement containing a false statement when the defendant knows its falsity. (2) It is also a crime for a defendant to knowingly file a registration statement containing a misleading statement when he knows it to be misleading. Appellant contends not only that the negligence clause is totally vague but that that portion of the mens rea clause predicating liability upon intentionally filing a misleading statement is also unconstitutionally vague as to the proscribed behavior. Only that portion of the statute which predicates liability upon knowingly filing a false statement is sufficiently precise to be invulnerable to constitutional attack.

Appellant has a right to challenge the vagueness of the provisions described above even if there had been evidence that he could be brought within the knowingly-filing-a-false-statement classification. The language of the statute rather than the proof at trial is the relevant focus when considering a challenge of void for vagueness. Lanzetta v. New Jersey, 306 U. S. 451 (1939). Moreover, a particular defendant may challenge the vagueness of the

statute as applied to certain kinds of persons even though he does not come within that particular category. Winters v. New York, 333 U. S. 507 (1943); Thornhill v. Alabama, 310 U. S. 88 (1940).

The term "misleading" appears in both the mens rea and the negligence clause. Therefore, the vagueness of the latter provision is compounded by applying an indeterminate standard of liability to a referentless category of proscribed behavior.

A vague statutory category is one which could be applied to both blameworthy and blameless conduct given the reference points of the statute. Gelling v. Texas, supra; Lanzetta v. New Jersey, supra.

What is meant by "misleading"? The problem of the misleading statement is always one of context. People are most often mislead by half-truths, or when facts about a situation are omitted, or are presented ambiguously. Whether a statement is misleading depends upon to whom it is addressed. To a person of sophistication about a matter, a statement omitting some details may not be misleading, because his own knowledge may supply the missing facts. To the naive, to leave out such facts may give a totally distorted picture. Whether a statement in a registration application is misleading depends to a large degree upon the sophistication of its addressee.

Must the statement be misleading to the

Director of Securities? In the regulatory scheme of the statutes he plays the critical role in protecting investors by disclosure. No security may be issued without his approval. He brings expert knowledge to his task, under section 189.13, Wis. Stats., he has vast investigatory powers to determine the accuracy of any statement in a registration application and can decide if it is in the public interest to register a security.

Does the term mean misleading to the investor? Certainly his frame of reference is different than that of the director. A registration statement is often of absolutely no value to many securities purchasers, given the complex nature of the statement. As Justice Douglas, (then Commissioner Douglas of the SEC) noted:

> "Those needing investment guidance will receive small comfort from the balance sheets, contracts or compilation of other data revealed in the registration statement. They either lack the training or intelligence to assimilate them and find them useful, or are so concerned with a speculative profit as to consider them irrelevant." Loss, Securities Regulations, Second Edition (1961), Vol. 1, p. 124.

Depending upon the person deemed the addressee of a statement in a registration application, it may or may not be "misleading". The statute itself offers no guidance in identifying the relevant addressee.

From the perspective of the person considering a course of conduct, -- an officer, director, agent or employee of an issuer -- he simply cannot determine whether particular statements will subject him to criminal liability, even if he concluded that a statement might mislead an investor but would not mislead the director. From the regulatory scheme of the statute, it seems reasonable that the director must be misled. Since the Wisconsin Supreme Court has stated in State v. Eisbach, 263 Wis. 554, 47 NW (2d) 725 (1953), that the purpose is to protect investors, we do not know authoritatively in advance whether the director or the investor must be misled. Therefore, a person desirous of complying with the law does not know in which direction to move. If he files the statement, believing it might mislead an investor but not the director and believing that the director is the relevant addressee of the statement under the statute, it would be hard to deem his behavior as anything but morally neutral. Nevertheless, a prosecutor might disagree with him, and persuade a trier of fact that the relevant addressee is an investor who might be misled by any statement in a registration application.

An authoritative construction may come from an appellate court to the effect that the Director is the relevant addressee, but meanwhile the defendant, acting upon a reasonable construction of a referentless category of "misleading" may be subjected to the financial and psychological pressure of a trial and may be financially ruined by the pall that has hung over his business.

For these reasons, the term "misleading" as it appears in both the negligence and the mens rea clause is unconstitutionally vague as to the proscribed behavior.

D. Avoidance of Desirable Activity Because of the Indeterminancy of the Standard of Liability or the Definition of the Proscribed Behavior.

Cases in this Court have not only emphasized the unfairness of an after-the-fact determination of criminality, under an indeterminate definition of proscribed conduct, but have also noted that the person considering a course of conduct may forbear it precisely because of uncertaintites as to his criminal liability. Therefore, it is this consequence of vague statutes, i. e. the curtailment of desirable activity, that has been grounds for their demise.

As the professors of the Washington Law School (who were among those who brought the action in Baggett v. Bullitt 377 U. S. 360 (1964)) were unsure as to whether or not they could criticize the U. S. Supreme Court, after taking an oath to always encourage respect for United States "institutions", so, too, a president of a business concern such as the appellant may resolve the uncertainties by refusing to sign and submit the registration statement until he has clarified all ambiguity. Since "time is of the essence" in a securities issue, the decision to defer may well spell, mediocre performance or worse, for those companies who must finance by going to the securities market. It is

all but impossible for small business to expand significantly out of retained earnings as do most corporate giants. This is a matter of real concern in our economy. If we are committed to an economy of multiple enterprises to preserve economic efficiency, and qualitative individual freedom, then we must be concerned about the fate of small businesses that must rely upon the securities market for financing. Creating a situation paralyzing aggressive business behavior because of uncertainty of criminal consequences, threatens the existence of a pluralistic economy.

E. Inapplicability of the Necessity Doctrine.

In some cases the court has been faced with either sustaining a relatively indeterminate statute or dispensing with any regulation of the subject matter. Under these circumstances the court has sustained the statute, arguing that through construction and other techniques harsh results can be avoided. Because the substantive objective of the regulation was deemed to be desirable, some defendants were required to carry a heavier burden of uncertainty as to the legality of a prospective course of action than is normally the result. The leading case under the necessity rationale is U. S. v. Petrillo, 332 U. S. 1 (1947) which sustained the Lea act making it a crime for any person to require a radio broadcaster to hire persons in "excess of the number of persons employed".

The purpose of Chapter 189, Wis. Stats. is to adjust the balance of power between an individual buyer and an organized seller. The statute gives to the buyer an expert investment counsellor in the form of the Director who apprises him by the fact of registration, that the relationship between the securities and the financial position of the company is such that he will at least get a "run for his money". (The purpose of this statute is not to guarantee to the buyer that his investment will be profitable.) This can obviously be achieved within the present terms of Ch. 189, Wis. Stats. without imposing criminal sanctions upon officers of the issuing company on an indeterminate standard of liability in a referentless category of proscribed statutory conduct.

The most basic regulatory device is set forth in sec. 189.12, the power of the Director to refuse to register a stock if it fails to meet the criteria of sec. 189.13 (3), after the Director has conducted an investigation using the full powers granted to him by sec. 189.13. The investor can be protected without having to arbitrarily place men in prison. Once the stock has been issued, the Department is not then deprived of further sources to protect the investor against buying the "Blue Sky". Section 189.16 authorizes stop orders subsequent to the issuance of securities. Sec. 189.17 (5) grants the Director the power to enjoin further issuance of securities, given a finding of fraudulent activity. Section 189.11 authorizes a total prohibition of sale upon determination of certain fraudulent activities.

Moreover, under sec. 189.18 (4), a securities sale is voidable at the option of the purchaser upon a determination of fraud in any respect relating to the sale.

Appellant does not take the position that criminal penalties are not appropriate under any circumstances. Pursuant to sec. 189.19 (2) (a), Wis. Stats., criminal sanctions can be imposed upon a person for a knowing violation of a precisely detailed order issued by the department. See Yakus v. U.S., 321 U.S. 414 (1944). Certainly a person who violates the terms of this provision is morally blameworthy but it is quite another matter to say that, given this full range of sanctions this state must also place men in prison for five years on standards as indeterminate as those contained in sec. 189.19 (2) (d).

F. Summary

For all these reasons, (1) the negligence clause which imposes liability, if in the exercise of reasonable care a director, officer, employee or agent of an issuer should have known that the registration statement contained a false or misleading statement, and (2) the clause which imposes liability if this affected class knowingly causes to be filed a registration statement containing a "misleading" statement are unconstitutionally vague.

Since the information in this action was predicated upon these clauses, it must be dismissed.

II.

The Pre-trial Publicity primarily generated by the Attorney General was so Prejudiced that There is a Reasonable Likelihood that Appellant did not Receive a Fair and Impartial Jury Trial, and the Activities of the Agents of the State in Generating this Publicity Constituted a Denial of Due Process.

A. Introduction.

A principal issue in this case is prejudicial and unfair pre-trial publicity. This is a case of flagrant abuse of the powers and prestige of his office by the then Republican A. G.. This official was engaged in an election campaign which he subsequently lost. While the A.G.'s office conceded that it had full legal authority to prosecute the appellant, the A.G. apparently elected, as a campaign tactic, to publicly attack public officials of the opposite political party for not charging and prosecuting the appellant and for covering up alleged wrongdoing of appellant.

Most of the pre-trial publicity was generated by the A.G.'s new conferences, news releases, and appearances on radio and TV. Typically, his presentation attacked some Democratic public official for covering up the alleged wrongdoing of the appellant and his companion officers. Republican candidates for United States Senate, governor, lieutenant-governor, and D.A. of Dane County took up the cry of the A.G..

B. Conduct of the Attorney General.

Despite his own authority to prosecute, the A.G., from September 2, 1964 until election day, campaigned in the news media to discredit Democratic candidates on the grounds that they were covering up criminal activities of appellant and others, withholding information and failing to prosecute.

The activities of the prosecution, primarily the A.G., himself, were so violative of the constitutional command that each accused is entitled to a fair trial by an impartial judge and jury, that the charges should be dismissed or, at the least, that a new trial should be granted. In Sheppard v. Maxwell, 384 U.S. 333 (1966) the prejudicial pre-trial publicity was also frequently initiated by the prosecution, but here we have an instance where the prejudicial pre-trial publicity was generated almost entirely and in great volume by activities and statements of the State's chief prosecutor. The appellant here is not relying solely upon a prejudicial pre-trial rationale such as that urged in cases concerned solely with the impact of the content of the publicity upon the judge and jury. Rather, the appellant is directing its attack both on the content of the pre-trial publicity and upon the source of this publicity--agents of the State, particularly the A.G.

Many examples of the pre-trial publicity and its source were presented in the April 9, 1965 hearing on appellant's pre-trial motion to dismiss. The hearing revealed that the A.G.

signed complaints against appellant, Kelly and Bylsma on September 30, 1964, at a dramatic press conference which he called in his office and at which television cameras and newspapermen abounded. This got banner headlines in both Madison newspapers and was carried on television extensively. The A.G. had previously called for the resignation of Insurance Commissioner Manson, which also made front-page headlines in connection with this defendant. The pre-trial proceedings had the aura of a staging for maximum publicity.

The events immediately preceding issuance of the information are most noteworthy. The Democratic D.A. wrote a letter to the Wisconsin State Journal on October 12, 1964. It was printed in full on the front page and detailed the tremendous pressure from the Attorney General to prosecute, stating in part:

> "I was informed by Mr. Cole (Deputy A. G.) that the procedure which they were following had been discussed by them and that their considered opinion was that I, as District Attorney, should be kept hanging 'right down to the wire' and would thereby be 'put in a box' with nowhere to go.
>
> "I suggested that their manner of handling the case seemed to be more guided by publicity and political considerations than by dictates of good prosecutive procedure. I was again told that the Attorney General was purposely putting me in what he considered to be a box." (Parenthetical material supplied.).

On October 13, 1964, the A.G. wrote to the Wisconsin State Journal. He refers to the October 12 letter from the D. A., This letter of the A.G. was printed on October 14th at length in the Wisconsin State Journal. In this letter the A.G. accused the D. A. of playing politics, attacked the Democratic Governor and the Democratic appointee, the Commissioner of Insurance. The A.G. stated in part:

> "Initially, I did hope Mr. Torphy would handle the prosecution of the sworn complaints I made promptly and without regard to politics even though he was Governor Reynolds' political appointee. However, practical consideration indicated he might not. Accordingly, as Mr. Torphy states, I did deliberately attempt to 'put him in a box with nowhere to go' except into the criminal court as a prosecutor. By making public the fact of my sworn complaints I made it impossible for him to allow them to gather dust in his office without being subject to the public pressure so effectively exerted by the Wisconsin State Journal and the Milwaukee Journal."

> "There was another course I could have followed. I could have quietly and privately filed the complaints, waited for the inevitable stall and then made complaint to the Governor. Since the Governor has yet to acknowledge my demand for an investigation of Mr. Manson, except in political speeches to party members wherein he commended Mr. Manson, the futility of following the alternative course was apparent."

An affidavit of counsel for Kelly was admitted into evidence at the hearing on the pre-trial motion to dismiss. As a part of that affidavit, there is contained the audio portion of a televised political advertisement which was part of the A.G.'s campaign. This audio portion was delivered against a background of the music which was played during the well-known radio and television show entitled "Dragnet". This video tape was shown over television stations thirty-five times in seven cities throughout the state just before appellant was charged. These television stations covered all areas of the state where television can be seen. The film had the word "censored" superimposed over a picture of the state capitol. The advertisement attacked "highly questionable financial manipulations by political cronies of Governor John Reynolds and leaders of his campaign committee". It stated that "Insurance Commissioner Manson attempted to keep the scandal buried". It continued, "George Thompson was determined that the Reynolds administration was not to be allowed to cover up possible wrongdoing in Wisconsin as the Johnson administration had buried the Billie Sol Estes and Bobby Baker scandals in Washington. Fighting attempts by Commissioner Manson to block the probe every step of the way, George Thompson began his investigation. This is Attorney General George Thompson. This is his story". The A.G. then appears on the film and, after attacking the Insurance Commissioner, appellant and others, says:

"In my opinion this is an example of the

creeping corruption that can only be cleaned out of Wisconsin's government by returning to full and effective Republican leadership. Won't you please help me?"

At the hearing on the pre-trial motion to dismiss, a substantial amount of the pre-trial publicity was introduced into the record in the form of a scrapbook, which contained newspaper clippings in chronological order and audio and visual tapes of the radio and television publicity of the A.G. The scrapbook received into evidence contains ample evidence of the pre-trial publicity.

Few cases exceed this one in quantum of reported material, prejudice in content and recklessness of conduct. While the A.G. has the duty to investigate crime and make public what he deems necessary to the public interest, the actions of the A.G. in this case were outrageously prejudicial to appellant and patently political--designed to secure his reelection and nothing else. If the A.G. has not exercised his right to inform the public with circumspection so as not to prejudice or impair the right of appellant, the appellant should be granted a dismissal, or at least, a new trial.

The State Supreme Court said:

"If his conduct overstepped the bounds of his legal ethical obligations... proper inquiry could be made by the integrated bar disciplinary procedures under Canon 20 of the 'Canons of Professional Ethics.'"

This would provide no remedy for the appellant. The utterly reckless conduct of the A.G. here demonstrated a complete disregard for the rights of the appellant. This Court should grant a dismissal or direct a new trial.

C. Conduct of other politicians which should reasonably have been foreseen by the A.G.

The political advertising of the A.G. and other candidates for state office, repeating his charges, was state-wide. "FACTS", a Republican newsletter distributed state-wide, having a circulation of just under 30,000, also repeated his charges. Thus the publicity permeated the entire state.

The Wisconsin State Journal, on September 23, 1964, quoted the Republican candidate for Governor as stating that the case "smacks of the Bobby Baker mess in Washington. The Democrat tactics of the national administration are being transplanted to Madison." The Milwaukee Sentinel on that same day quoted that candiate as saying: "The protection of political cronies at the expense of the people has no place in Wisconsin."

The A.G. should have reasonably foreseen that other candidates for political office would pick up his charges. The Republican candidate for the United States Senate, in a statement issued at Oshkosh, Wisconsin, on September 4, 1964, stated that it was a

> ". . . sad day for Wisconsin. We have a rich heritage of clean state government, but, if the Attorney General's allegation concerning the Commissioner of Insurance are true, it means our state has been tainted by corruption. What happened to Governor Reynolds; highly publicized 'code of ethics' for state employees? More important, what has happened to the integrity and moral force that once was the bulwark of Wisconsin government? The issue of corrpution to government--federal and state--is now a major campaign issue."

The candidate for governor attacked the Democratic administration as one of "creeping corruption and ethical dry rot." He mentioned the political contribution of the officers of MAGIC, including the appellant, to the Democratic party.

Radio and advertising executives testified at the hearing on the motion to dismiss that a one-minute "Old Black MAGIC" taped announcement was broadcast eighty-nine times between October 26 and November 1, 1964. It was a campaign advertisement for the Republican candidate for district attorney and the music "That Old Black Magic" provided the background for the commentary. The broadcast suggested that District Attorney Torphy would not take action against MAGIC and stated that John Crawford, the Republican candidate, would make a district attorney that could be trusted. The order for the broadcast was placed by the Republican Party of Wisconsin. The defendant was charged on November 6, 1964.

In headlines of October 12, 13 and 14 in the Wisconsin State Journal, the Attorney General and the Republican candidate for District Attorney demanded action by the D.A. This pressure prevented the D.A., acting in a quasi-judicial capacity, from dispassionately considering whether to prosecute. Appellant was entitled to such consideration as a matter of due process. This is analogous to the pressure for prosecution criticized in Sheppard, where, after acknowledging the important role of the press in the administration of justice, the Court said: at page 350

> "But the Court has also pointed out that legal trials are not like elections, to be won through the use of the meeting-hall, the radio and the newspaper. Bridges v. California, supra, at 271. And the Court has insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power'. Chambers v. Florida. 309 U.S. 227, 236-237 (1940)." (The citation for Bridges is 314 U.S. 252 (1941).)

Much of the pre-trial publicity dealt with matters which were never put into evidence. A vast amount of the publicity involved the appellant as an officer of MAGIC. He was actually tried as an officer of Allied. Most of the publicity created the impression that the defendant had compromised public officials, who were

withholding prosecution because of political friendships, and that a trial would result in defendant being found guilty of criminal conduct.

If this type of political campaigning, using the defendant as a political pawn, must be permitted under recognized doctrines of free speech, then surely there should be some protection by the courts when the political pawn is charged and brought to trial as a by-product of the political campaigning.

D. Basic objectives to be achieved by the due process decisions.

The Supreme Court utilizes the due process rationale to achieve two basic objectives: (1) to insure reliable fact finding determinations, (2) to affirm the basic value of our society -- individual human worth.

In a concurring opinion in Estes v. Texas, 381 U.S. 532 (1965) Warren, C.J. states at p. 564:

> ". . . the criminal trial under our constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt; and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated."

Where the court has focused directly upon the conduct of the prosecution, there is concern for the reliability of the fact finding determinations.

The basic rationale surrounding the prosecution's affirmative obligation to take steps to create an atmosphere for reliable fact finding has been described in these terms:

> "The principle of Mooney v. Holohan is not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain:
>
> > 'The U. S. wins its point whenever justice is done its citizens in the courts.'"

Brady v. Maryland, 373 U. S. 83 (1963)

This Court, at 362, in Sheppard, commented:

> ". . . unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals

> have the duty to make an independent evaluation of the circumstances. . . . The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function."

Here, agents of the State not only failed in their duty to take steps to create an atmosphere of reliable fact finding, but rather undertook a course of action which could have no other effect but to shroud in uncertainty the issue of the fairness of the trial.

The second basic objective of the due process cases is to affirm the basic value of our society--individual human worth. Due process requires that a defendant always be treated as a man rather than as an object to be manipulated for another's purpose. The rationale for excluding confessions has shifted from a concern with the reliability of the confession to a concern with the manner in which the organized power of the State treated the defendant. In Rogers v. Richmond, 365 U.S. 534 (1961), the Court noted that involuntary confessions are excluded:

> ". . . not because such confessions are unlikely to be true, but because the methods used. . . offend an underlying principle in the enforcement of our criminal law; that

ours is an accusatorial and not inquisitorial system--" (page 540)

Appellant was not treated as a man entitled to a forthright face to face confrontation during the investigative stage of this proceeding, but as a pawn to be manipulated as a means to an end, and specifically a political end--the re-election of the then attorney general.

E. Dismissal is an appropriate remedy, but, at least, appellant is entitled to a new trial.

In arguing for dismissal as the appropriate remedy the appellant makes the following points:

It is obvious that a repetition of the prosecution's behavior can be deterred only if its consequence is a total denial of prosecution. A man bent on manipulating defendants as a means to political victory may be undismayed by the fact that his conduct will result in requiring the State to pursue successive prosecutions until they find triers of fact unaffected by the conduct or until the State can obtain legally sufficient evidence which is not tainted by the conduct. However, freezing the prosecution at the threshold, shifting some of the responsibility for relieving potentially guilty persons of liability to agents of the State, may cause prosecutors to think carefully before embarking upon a campaign of manipulation.

An example where the court found dismissal an appropriate remedy for improper activities on the part of agents of the State was State v. Cory, 62 Wash. (2d) 371, 382 P. (2d) 1019 (1963).

There the sheriff eavesdropped on a conference with defendant and his counsel. The court indicated that granting of a new trial would be an inadequate remedy. It cited the following language from Coplon v. U.S., 89 U.S. App. D.C. 103, 191 F (2d) 749 (cert. den. 342 U.S. 926) (1951):

> ". . .No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty."

In effect, the State's conduct constituted an executive "Bill of Attainder". Appellant was singled out for prosecution in much the same way the English parliament "outlawed" persons who were political opponents of the existing regime. It was this result which the framers of the Constitution sought to avoid by Article I, Section 9, Clause 3 of the U.S. Const., denying to the Congress the power to enact bills of attainder. Although formally this provision does not apply because we are not dealing with an act of the legislature, by analogy the State's conduct in this prosecution violates the spirit of the attainder clause. The defendant as an individual was singled out for prosecution because of political considerations rather than a concern for protecting wider interests of the community.

In Estes v. Texas, supra, the concurring opinion of Warren, C.J. stated at p. 565 that televising criminal trials to the public was a

violation of the 14th Amendment on three grounds, one of them being:

> "(3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others."

The opinion of the State Supreme Court does not appear to decide the merits of defendant's contention that the pre-trial publicity was so prejudicial as to deny him a fair trial, but rather is based on procedural considerations, i. e. a failure to request a change of venue or continuance.

It is true that the appellant argued only for a dismissal of the charges on his original argument before the State Supreme Court prior to this Court's decision in Sheppard. The appellant's attack was distinguished from that found in the usual pre-trial publicity case by pointing out that the source of the prejudicial pre-trial publicity was the State, itself. This should not prevent the appellant from now contending, as he did on rehearing in the State Supreme Court, that if he is not entitled to a dismissal, he is, at least, entitled to a new trial. The State Supreme Court seems unduly technical in refusing to consider this argument since a motion for a new trial was made to the trial court. A failure to grant a new trial or a dismissal means a three year prison term in the state penitentiary, for a man with no prior criminal record.

This Court, in Sheppard, has announced rules of conduct for law enforcement authorities which make costly their participation in trial by newspaper. Reversal of a conviction where unconstitutional conduct by law enforcement authorities pervaded the proceedings has been used effectively by this Court in other cases as a deterrent to such conduct, e.g, Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained by illegal search and seizure); Beck v. Ohio, 379 U.S. 89 (1964) (unlawful arrest); Griffin v. California, 380 U.S. 609 (1965) (comment by prosecutor on failure of defendant to testify); and see Mooney v. Holohan, 294 U.S. 103 (1935); Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959); Brady v. Maryland, 373 U.S. 83 (1963). A presumption of inherent unconstitutionality in a highly publicized trial where law enforcement authorities actively participate in the inflammatory press releases will assist materially in eliminating the practice of "anticipatory trial by newspapers" which currently impairs our administration of criminal justice. Irvin v. Dowd, 366 U.S. 717, 728 (1961) (concurring opinion)

F. A change of venue or a continuance were not effective remedies for the appellant here.

The remedies which are usually suggested to overcome the effects of prejudicial pretrial publicity are continuance and change of venue. These suggested remedies are, of course, at odds with the 6th Amendment to

the United States Constitution. The appellant did not request these remedies, although prior to trial and in motions after verdict he requested a dismissal because of the misconduct of the State.

It is doubtful that a fair trial could be had in any county in Wisconsin under the circumstances of such adverse state-wide publicity.

Appellant's concern for his duty to his businesses and the obvious advantage from this standpoint of a trial in Dane County had to be weighed against the possibility of having a better chance to get a fairer jury in a distant county despite the state-wide nature of the publicity. Under these circumstances, a change of venue was not a practical remedy, for it would have taken the accused away from the business at a time when the business desperately required his presence on a daily basis. The trial here lasted three weeks.

There should be no requirement that a defendant give up his rights under the Sixth Amendment to the Constitution--when the State, itself, is responsible for depriving him of those rights--in order for that defendant to request a new trial on appeal. It is for the appellate tribunal to decide whether the accused has had a fair trial by an impartial judge and jury. If that tribunal decides that there is a great likelihood that the judge or jury were not impartial, then the appellate tribunal should grant either a new trial or a dismissal whether or not the defendant requested a change of venue or continuance.

A failure in the instant case to have a speedy trial meant to the appellant the end of some very substantial business ventures. A request for continuance, if granted, would have meant that the construction and real estate development businesses of the appellant which relied largely on institutional credit, would certainly have ended in out and out bankruptcy. This occurred in the months subsequent to the adverse verdict.

The trial court, in this case, was abundantly aware of the pre-trial publicity. The Court noted:

> "It could very well be that by virtue of the publicity which has taken place that it would be extremely difficult to impanel a jury in Dane County which could be fair and impartial. It is also conceivable that it might be difficult to impanel a fair and impartial jury in a county which adjoins Dane County." (R. 11)

G. Newspaper pressure combined with pressure from Republican politicians to bring about the indictments.

Newspaper pressure for prosecution may have been in part generated through a desire for self protection against libel suits.

At least one Madison newspaper was deeply concerned about the possibility that they may have engaged in libel of the defendants. A newspaper employee testified that the

newspaper's attorney advised him that a demand for retraction of statements concerning possible check kiting had been received and that he called an assistant attorney general to determine how good the evidence of this sort of activity was. He said he wanted to find out ". . .for our own purposes and for purposes of whatever action might ensue from this demand for retraction. . ."

The witness indicated that the Assistant Attorney General said he would be happy to talk to the newspaper's attorney and explain what information he had available to prove the matter.

This is noteworthy, since a formal demand for retraction of the check kiting charge was served on the newspaper and the Director of Securities. The Director issued to the newspapers a release in which he stated that he made no allegations of any kiting of checks. It is not strange, then, to find in the scrapbook, that an editorial from the Wisconsin State Journal for October 12, 1964, has, as its headline, "Time for Action by Torphy". It would be a travesty on justice if newspapers could generate adverse pre-trial publicity and then protect themselves from libel suits by goading prosecutors to prosecute.

The same newspaper employee testified that coverage of this story was almost daily in September and October.

This Court noted in Sheppard: at p. 363

"Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

The collaboration of an Assistant Attorney General with the newspapers on the libel question seems to violate this announced principle.

H. Actual Prejudice Need Not Be Shown Since The Activities of the A. G. Were Inherently Lacking In Due Process.

Due process cases today are concerned not only with the actual effect of pre-trial publicity, but also the probable effect.

This Court in Sheppard stated:

"Only last term in Estes v. Texas, 381 U. S. 532 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:

'It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process' At 542-543.

> "And we cited with approval the language of MR. JUSTICE BLACK for the Court in In re Murchison, 349 U.S. 133, 136 (1955), that 'our present system of law has always endeavored to prevent even the probability of unfairness.'" (Emphasis supplied)

There is a normal reluctance of a juror to concede his bias before his peers. As stated in Irvin v. Dowd, 336 U.S. 717, 728 (1961):

> "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

The application of the principle that actual prejudice need not be shown where the circumstances are inherently suspect constitutionally is particularly appropriate in cases involving publicity-poisoned criminal trials. For where such trial contamination is charged, "one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." Estes v. Texas, 381 U.S. 532 at 544 (1965)

We think it is logical to assume that the A.G.'s comments on this case prior to trial affected the impartiality of the judge as well as the jury. For

> "(t)o deny that bludgeoning or poisonous comment has power to influence or at lease to disturb the task of judging is to

play make believe and to assume that men in gowns are angels. The psychological aspects of this problem become particularly pertinent in the case of elected judges with short tenure." Pennekamp v. Florida, 328 U. S. 331, 359 (1946) (concurring opinion).

As evidence of the possible influence that pre-trial publicity had upon the trial judge, we draw the court's attention to the sentence imposed--three years in the State prison. Even the State Supreme Court commented on this, saying, "The sentence imposed, upon the record we have before us, seems quite severe but that fact does not go to the merits of the conviction." (R. 119)

Further evidence of the possible influence of the pre-trial publicity upon the trial judge is found in the disparity of sentences between appellant and Kelly. Although both were top executives of the company, the court sentenced the Democrat, appellant to three years while the Republican, Kelly, was put on probation. The pre-trial publicity stressed that appellant was a major contributor to Democratic campaigns.

A ruling by this Court that accusatory publicity charging or insinuating guilt is inherently prejudicial and a denial of due process if issued by a principal prosecuting officer would have a salutory effect. It would impress prosecutors with their responsibilities toward the courts, and would warn those

campaigning for political position that cynical abuse of the powers of their office to obtain convictions and to insure election will not be tolerated.

I. The Trial Judge Failed To Adequately Protect The Jury From Prejudicial Outside Influences.

In Sheppard the Court said:

". . . sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. . ."

In the instant case, counsel requested sequestration and the Court planned initially to sequester the jury. It soon became apparent to both the Court and counsel that there would be great difficulty in obtaining jurors for an estimated two week trial if the jury were to be sequestered. Appellant was faced with a dilemna: this time weighing the business necessity of a speedy trial against the prospect of the jury being prejudiced by out of court publicity unless sequestered.

It was reluctantly decided to proceed without sequestration of the jury with the Court admonishing the jury when it left the Court. The concern expressed by counsel on the record concerning adverse publicity should be noted.

The admonishment given jurors by the

trial court is almost identical to that criticized as inadequate in Sheppard. After several repetitions, the admonishments usually tended to be somewhat more cursory.

In Sheppard, the trial judge did not order the jury to assiduously avoid contact with news items concerning the case. In this case, there was likewise no such order. This Court criticized the trial judge in the Sheppard case for not undertaking to protect the jury with the vigor and care for which this responsibility called.

III.

THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT COMMAND THAT A JUDGE NOT DIRECT A VERDICT AS TO ANY MATERIAL ELEMENT OF THE CRIME OF WHICH THE DEFENDANT HAS BEEN ACCUSED.

Section 189.19 (2) (d) of the Wisconsin Statutes, under which appellant was prosecuted, describes as guilty of criminal conduct anyone who

> "file(s) or cause(s) to be filed with the department any statement or representation of a material fact, which statement or representation he knows or in the exercise of reasonable care should know to be false or misleading." (emphasis and parenthetical material supplied)

The trial court said with reference to materiality in its instruction:

> ". . . If you find beyond a reasonable doubt that this balance sheet was submitted by the defendants for the purpose of obtaining permission to issue stock of Allied . . . to the public, then the cash item must be found by you to be material to the question of whether or not permission to issue stock should be given by the . . . Department. . . or to the question of whether or not a prospective purchaser should purchase such stock." (emphasis supplied). (R. 19)

It was at all times admitted that the defendant submitted the balance sheet in question for purposes of obtaining permission to publicly issue stock.

Since the Court told the jury that if the statement was submitted for purposes of issuing stock to the public, the jury must necessarily find the cash item to be material. If they believed the cash item to be false or misleading they necessarily had to find appellant guilty. The jury never passed on the question of its materiality.

Material should have been defined as requested by appellant. (R. 29-31) See Mutual Industrial Bankers, Inc. 1 SEC 268, (1936). Red Bank Oil Co., 25 SEC 334 (1947). This jury never passed on this question, since it was decided for them by the Court's instruction.

Just as the 6th Amendment of the United States Constitution guarantees a trial by jury, which has been interpreted to mean that the jury must pass on all material elements of the crime in U.S. v. Taylor 11 F 470 (1882) and Byrd v. U.S., 342 F (2d) 942 (1965); Article I, Section 7, Wis. Const. guarantees trial by jury, which has similarly been interpreted to require the jury to pass on all material elements of the crime in State v. Evjue, 254 Wis. 581, 37 N.W. (2d) 50 (1949). The 14th Amendment to the United States Constitution bars any state from depriving any person of liberty without due process.

The Court's instruction violated due process by effectively depriving appellant of his constitutional right to trial by jury upon all material elements of the crime.

CONCLUSION

Upon the foregoing statement it is respectfully submitted that the questions presented by this appeal are substantial and are of public importance and that probable jurisdiction should be noted.

IMMELL, HERRO, BUEHNER,
DEWITT & SUNDBY, S.C.

Attorneys for Appellant.